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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-440

FRED MANDELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-441

ENID MANDELL AND ERNEST FAIRCHILD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Fred Mandell Pet. App. A) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1975. The joint petition seeking rehearing and rehearing *en banc* was denied on August 25, 1975 (Fred Mandell Pet. App. B). The petitions for a writ of certiorari were filed on September 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were denied the effective assistance of counsel because of their joint representation by the same retained attorney.

2. Whether the trial court improperly limited petitioners' right to cross-examine two of the witnesses called by the government.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were each convicted of mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343. In addition, petitioners Fred and Enid Mandell were convicted of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. 2314. Petitioner Fred Mandell was sentenced to concurrent terms of five years' imprisonment. Petitioner Enid Mandell was sentenced to concurrent terms of two years' imprisonment, with provision for parole under 18 U.S.C. 4208(a)(2). Petitioner Fairchild was sen-

tenced to concurrent terms of imprisonment for a year and a day. The court of appeals affirmed *per curiam* (Fred Mandell Pet. App.).

The evidence at trial showed that in June 1973 petitioner Fred Mandell, an attorney, convinced his associate, Harold Kriv, also an attorney, to purchase for $75,000 a one-half interest in two personal injury judgments against the City of Chicago. Mandell represented to Kriv that the judgments could be purchased at less than their face value from his clients and then resold for a substantial profit.[1] The judgments, which were actually for $1,000 each, had been altered to appear as if they were each for $120,000 (Tr. 63-66, 74-75, 110-114, 1106-1112). Later, petitioner Enid Mandell showed Kriv a check for $211,000, which she represented to be the proceeds from resale of the judgments (Tr. 114-120).

Thereafter, an unidentified individual shot Kriv (Tr. 124-125). While Kriv was hospitalized, Fred Mandell and petitioner Fairchild met with Kriv's wife. Mandell told Mrs. Kriv that the man who had shot her husband had been sent by a gang whose members allegedly had been cheated out of a large sum of money by Kriv and that the members of the gang had threatened to beat her husband once he left the hospital unless they were paid off (Tr. 417-418). At another meeting, which Enid Mandell arranged,

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[1] Mandell claimed that his clients wished to sell their judgments for less than face value because they were unwilling to wait the necessary 2½ years for payment by the City (Tr. 63-64).

Fred Mandell warned Mrs. Kriv that if her husband died, the gang would still demand payment and, if not paid, that they would kill her and her children (Tr. 425). Mrs. Kriv finally agreed to permit the $75,000 that her husband originally paid for the judgments, and which he was now entitled to receive as part of the proceeds of their alleged sale, to be turned over to the gang (Tr. 427).

Harold Kriv was subsequently pressured into giving an additional $27,000 to Fred Mandell after Fairchild claimed that he had investigated Kriv's shooting and had discovered that Kriv and certain other attorneys were the targets of a gang whose members believed they had been cheated by the attorneys who had represented them in personal injury cases. Enid Mandell also claimed that her family had been threatened by members of the gang because of Kriv. Kriv, who was in Chicago, raised a portion of the $27,000 by telephoning his father in Iowa—at Fred Mandell's suggestion—and his father mailed him a $15,000 check (Tr. 143-144, 153-154, 169-173).

In October 1973, Fred Mandell convinced Ira Leon to invest $65,000 for an interest in a $200,000 personal injury judgment against the City of Chicago.[2] This judgment—like the ones shown to Kriv—was an altered $1,000 judgment against the City (Tr. 546-553, 1106-1112). Subsequently, petitioners con-

[2] Enid Mandell arranged various meetings and passed information between Leon and Fred Mandell (Tr. 545, 563, 586).

vinced Leon to contribute an additional $58,000 for an interest in a fraudulent $300,000 judgment against the City of Chicago (Tr. 567-570, 580-581, 836-837). Fred Mandell and Fairchild also attempted to obtain additional money from Leon by representing that Mandell had killed a city attorney in an argument concerning one of the judgments and that for $50,000 Fairchild would dispose of the body. Mandell also claimed that he and Fairchild would need "getaway" money (Tr. 591-593).

ARGUMENT

1. Petitioners contend that they were denied the effective assistance of counsel because they were represented by the same attorney, Julius Sherwin.[3] But petitioners, one of whom is himself an attorney, freely chose to retain the same attorney. This is not therefore a case in which the joint representation complained of resulted from a court's appointing the same attorney to represent more than one defendant at trial. In any event, moreover, the court of appeals correctly rejected petitioners' claim since the record shows conclusively that they were not prejudiced by the joint representation and that they were, in all other respects, effectively represented.

a. Petitioners Enid Mandell and Fairchild specifically argue (Enid Mandell and Fairchild Pet. 18)

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[3] Another attorney, Benjamin Daidone, entered an appearance for the Mandells and was present at counsel table throughout the trial.

that they were prejudiced because defense counsel concentrated his efforts on behalf of petitioner Fred Mandell, who was more deeply implicated in the fraud. But as the court below noted (Fred Mandell Pet. App. 12-13), the record does not support this assertion.

The trial strategy adopted by petitioners was a common one, applying consistently to all three petitioners. Essentially, petitioners attempted to convince the jury that no scheme to defraud such as that charged in the indictment had ever existed, that Harold Kriv had fabricated his story after having read about the arrest of Fred Mandell in the newspaper and that Ira Leon's story simply represented an effort on his part to cover his embezzlement of company funds. In an effort to buttress this common defense, defense counsel called Enid Mandell and Fairchild to testify, and under his thorough questioning, they denied all of the charges against them (Tr. 1186-1218, 1303-1339). In addition, during his closing argument, defense counsel reviewed and highlighted their testimony (Tr. 1521, 1535-1536, 1539, 1543, 1545, 1548-1550).

Petitioners Enid Mandell and Fairchild also speculate that they were prejudiced because their counsel's representation of Fred Mandell denied them the opportunity to negotiate a plea agreement (Enid Mandell and Fairchild Pet. 18-19); however, they fail to specify how the joint representation might have frustrated such negotiations. Petitioners further speculate that the husband-wife relationship between Fred

and Enid Mandell and the employer-employee relationship between Fred Mandell and Fairchild increased the likelihood of prejudice (*ibid.*). But the record fails to show how such relationships hindered the presentation of their defense or might have undercut its believability. As the court below stated (Fred Mandell Pet. App. 13 n. 12), in order to demonstrate a Sixth Amendment violation because of joint representation, "[t]here must be a showing of a conflict of interests based on the record and not on mere speculation. No such showing has been made in this case."

b. Petitioner Fred Mandell also contends (Fred Mandell Pet. 9) that he was prejudiced by the joint representation because during closing argument defense counsel allegedly highlighted his greater involvement in the scheme.[4] But, as the court below

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[4] The relevant portion of defense counsel's argument was as follows (Tr. 1513):

> In any event, that these people—now, here is what they are talking about—devised and intended to devise a scheme and artifice to defraud and obtain money by means of false and fraudulent pretenses, representations and promises, knowing them to be false—the scheme was in substance that. And from this point on every reference to the indictment is Fred Mandell—and I don't want Fred Mandell to think I'm deserting him and selling him down the river, because when I get through talking to you, there are going to be many reasonable doubts that I will point out to you as to why regardless of what else happened, they have not proven a case, not even by a preponderance of evidence, supporting the legal opinion given by Mr. Kruse at least as to Kriv when he heard his story.

stated (Fred Mandell Pet. App. 14), the statement complained of by Fred Mandell constituted no more than a summary of the allegations contained in the indictment and could in no way have prejudiced him.[5]

c. It is true, as asserted by petitioners and as recognized by the court below (Fred Mandell Pet. App. 7-10), that the courts of appeals have adopted in the exercise of their supervisory powers varying approaches to the problem of dealing with possible conflicts of interest arising from an attorney's representation of more than one defendant. Compare, *e.g.*, *Lollar* v. *United States*, 376 F. 2d 243, 245-247 (C.A.D.C.), with *United States* v. *Paz-Sierra*, 367 F. 2d 930, 932-933 (C.A. 2), certiorari denied, 386 U.S. 935. But, at bottom, all of the approaches taken by the courts of appeals are directed toward ensuring that a conviction does not stand where there was a prejudicial conflict of interest arising from joint representation. Review by this Court is not required where a single aim—assuring that defendants are not prejudiced by joint representation—is sought to

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[5] Fred Mandell also asserts (Fred Mandell Pet. 9) that he was prejudiced by the joint representation because of the government's impeachment of Fairchild. But the "impeachment" referred to by Fred Mandel related only indirectly to the charges in the indictment, and involved merely a contradiction concerning whether Fairchild or others had attempted to determine who had shot Kriv (Tr. 1226-1228) and whether Fairchild had retained Fred Mandell on one occasion (Tr. 1240-1241). Moreover, if Fred Mandell was affected by the testimony to which he has referred, that effect was attributable to his joinder at trial with Fairchild and not to the joint representation.

be achieved by diverse applications of the lower courts' supervisory powers. Indeed, review by this Court is particularly inappropriate in this case since, under any approach, the record conclusively shows that there was no conflict of interest.

2. Petitioners next contend (Fred Mandell Pet. 10-16, Enid Mandell and Fairchild Pet. 21) that the trial court improperly sustained government objections to questions relating to the credibility of witnesses Kriv and Leon, and that they consequently were denied their right to cross-examination. The record shows, however, that petitioners were given ample opportunity to explore all areas they believed relevant to the credibility of the government's witnesses. As the court of appeals noted (Fred Mandell Pet. App. 15), "[t]o the extent that the trial judge did place limits on the inquiry, * * * he acted well within his discretion to limit the scope and extent of cross-examination. *See United States* v. *Isaacs*, 493 F. 2d 1124, 1162 (7th Cir. 1974), *cert. denied*, 417 U.S. 976."

a. The majority of petitioners' contentions concerning the court's rulings during their examination relate to the testimony of Harold Kriv. Kriv testified at trial that he and Fred Mandell had discussed the possible bribing of a state judge to facilitate their scheme to purchase judgments from Mandell's clients, but Kriv denied that he had actually bribed anyone (Tr. 257-263). After a thorough examination by defense counsel of Kriv's role in the bribery plan, the trial judge sustained the government's objection to

the following question: "Sir, have you ever bribed a judge in your life?" (Tr. 276).

Petitioners now assert that Kriv's answer to that question might have permitted them to show that Kriv hoped that his testimony would be considered in a decision to prosecute him for bribery (Fred Mandell Pet. 11-12, Enid Mandell and Fairchild Pet. 21). The trial court's ruling was proper, however, since Kriv already had fully detailed his role in the plan to bribe a state judge. Defense counsel could have asked whether Kriv expected that his testimony would be considered in a decision to prosecute him for his role in the plan to bribe a state judge, but he chose not to do so. Furthermore, since defense counsel made no offer of proof, there is nothing in the record to suggest that Kriv would have responded to the question at issue in the affirmative. Petitioners' allegations of prejudice are, as a consequence, wholly speculative.

Petitioners also contend that the trial court erred in sustaining a defense question concerning a civil suit that had been filed by Kriv against the Mandells. Kriv explained that he had filed a civil action against the Mandells to recover the money he had given them (Tr. 298-299). He stated that after receiving an order to appear for a deposition in connection with that action, he had caused the action to be dismissed without prejudice (Tr. 304-309). Kriv, an attorney, explained that he had moved to have the civil suit dismissed because of "trial strategy"; that is, he did not want petitioners to know the substance of his

testimony before he testified at their criminal trial (Tr. 310).[6]

Thereafter, defense counsel asked (Tr. 312): "Did either Mr. Shapiro or Mr. Benjamin [Kriv's attorneys] tell you that parties that you sue have a right to file a counterclaim against you?" The government's objection to this question was sustained by the trial judge, but not before Kriv had answered: "I am familiar with that, sir" (*ibid.*). Petitioners argue that the court's ruling prevented them from showing that Kriv may have been testifying at their criminal trial in an effort to preclude the Mandells from filing a counterclaim in a future civil suit (Fred Mandell Pet. 11, Enid Mandell and Fairchild Pet. 21). But, as noted, Kriv answered the question.

Kriv also testified that on one occasion he had violated the standards of ethics governing the conduct of attorneys by lending financial assistance to a client to permit the client to pursue a civil action (Tr. 367-368). When defense counsel asked, "[i]s that your habit, sir, as a lawyer?" the trial judge sustained the government's objection (Tr. 368). The court of appeals correctly held that defense counsel was given ample opportunity to explore Kriv's apparent violation of various ethical standards and that the trial court properly limited that inquiry in sustaining the objection referred to above (Fred Mandell Pet. App. 15). If, as petitioners contend (Fred Mandell Pet.

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[6] No person representing the government advised Kriv not to give the deposition (Tr. 361).

16, Enid Mandell and Fairchild Pet. 21), they wished to explore Kriv's possible hope that his testimony would be considered in any decision to initiate disciplinary proceedings against him, a question phrased in those terms should have been asked.

b. Ira Leon testified that as president and treasurer of the Dore Company, he had withdrawn $22,500 in company funds without the approval of the company's directors (Tr. 739-742). The only government objection sustained by the trial court during Leon's cross-examination was to the defense question, "[t]hat was an illegal transaction, then, wasn't it?" (Tr. 742).

Not only was the question improper, since it called for a legal opinion (McCormick, *On Evidence*, § 12, p. 28 (1972)), but it was subsequently answered when Leon stated in response to another question that he believed that his withdrawal of company funds had been proper (Tr. 742). Petitioners assert that they wanted to determine whether Leon hoped that his testimony would be considered in a possible prosecution against him for embezzlement (Fred Mandell Pet. 12, Enid Mandell and Fairchild Pet. 21). As before, however, defense counsel's question was not phrased in those terms.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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